

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

January 12, 2018

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Approval of a Letter from the Members of the Board of Land and Natural Resources to the Legislature in Support of House Bill 1120 and Senate Bill 986, Relating to Special Shoreline Encroachment Easements.

For the past several legislative sessions, the Department has introduced proposed legislation that would grant the Board the authority to issue special shoreline encroachment easements for structures that were authorized and built on private property landward of the shoreline, but due to erosion are now located seaward of the shoreline, at less than fair market value. The structures are privately owned and hence encroachments upon state owned submerged land, and that easements for those structures are necessary to resolve issues of maintenance and liability. As these structures are privately owned and serve to protect private property, the easements require the private landowner to assume the responsibility to repair and maintain the structure and any liability resulting from the existence of the structure. Pursuant to Sections 171-13 and 171-17, Hawaii Revised Statutes, the Board is required to charge fair market value for such easements.

The purpose of the proposed legislation is two-fold; 1) the Department believes that the successful passage of legislation will lead to greater compliance from landowners in obtaining easements, as the potentially high cost of the easement (as well as a general aversion to paying again for land that was once private) has discouraged following through on acquiring such easements; and 2) as expressed by members of the Board, and concurred by Department staff, it seems simply unfair to require a private landowner to compensate the State for use of lands that were once fast lands and privately owned that have since been lost to erosion and are now considered "submerged lands" owned by the State.

The measure so far has not gained support within the Legislature. In an effort to express the significance of this issue for both the Board and the Department, at the request of the Board members during board discussions on relevant agenda items, staff has drafted a letter in support of the measure for consideration by the Board, intended to be signed by the individual Board members and addressed to the chairs of the relevant legislative committees. The letter, attached as Exhibit A, discusses the importance of the measure, as well as asks the relevant committees to provide the bill both a hearing and passage.

Staff brings this letter before the Board for review and approval, and if approved, respectfully requests that each Board member sign the letter. For reference, the both House and Senate versions of the proposed legislation are attached as Exhibit B, and a copy of the Attorney General's opinion on this matter is attached as Exhibit C.

RECOMMENDATION:

That the Board:


1. Approve the attached letter, signed by the individual members of the Board.

Respectfully Submitted,



Ian Hirokawa
Special Projects Coordinator

APPROVED FOR SUBMITTAL:


Suzanne D. Case, Chairperson

DAVID Y. IGE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

JEFFREY. T. PEARSON, P.E.
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Senator Karl Rhoads, Chair
Senate Committee on Water and Land
Hawaii State Capitol, Room 204
Honolulu, Hawaii 96813

Senator Brian T. Taniguchi, Chair
Senate Committee on Judiciary
Hawaii State Capitol, Room 219
Honolulu, Hawaii 96813

Representative Kaniela Ing, Chair
House Committee on Ocean, Marine Resources & Hawaiian Affairs
Hawaii State Capitol, Room 427
Honolulu, Hawaii 96813

Dear Committee Chairs,

SUBJECT: House Bill 1120/Senate Bill 986 Relating to Special Shoreline Encroachment Easements

House Bill 1120 and Senate Bill 986 propose to provide the Board of Land and Natural Resources discretion to grant easements for less than fair market value for structures that were authorized by a governmental authority and located landward of the shoreline within the record boundary of the private property at the time of construction, but are now located seaward of the valid certified shoreline on public land. The undersigned members of the Board of Land and Natural Resources (Board) strongly support this Administration measure and request that the measure be heard and passed out of your respective committees.

Many of these structures were constructed mauka of the shoreline by private landowners to benefit their property, i.e., as shoreline protection structures. Over the years, many of these structures are now situated within or seaward of the shoreline and are a liability concern. In exchange for the granting of an easement, the Department requires insurance and indemnity protection. The problem under current law is that the Board must charge fair market value as determined by an appraiser for the easement, which discourages landowners from seeking easements. This bill seeks to remedy that problem by allowing the Board the discretion to grant the easement at below fair market value if the structure was authorized by a governmental authority and originally constructed landward of the shoreline within the record boundary of the landward property at the time of construction, but is now located seaward of the shoreline on public land.

EXHIBIT "A"

Given the increasing landward migration of the shoreline due to climate change-induced sea level rise and other tidal conditions, an increasing number of previously legal existing shoreline protection structures will be located on public submerged lands, resulting in an increase in the volume of easements that are expected to be processed. This measure would greatly expedite the disposition process. Allowing the easements to be granted at less than fair market value via a streamlined process would assist in encouraging compliance from littoral landowners entering into easements with the State. The appraisal process under Section 171-17, HRS, can sometimes be expensive and time consuming. By resolving the liability and indemnity issues, taxpayers will have greater protection from potential legal and financial liability against the State with regard to these structures. By facilitating compliance from landowners, this bill will reduce the burden on staff resources from having to pursue enforcement actions.

The Board emphasizes that this measure also seeks to address the issue of fairness, in addition to liability and indemnity. It is important to consider that the structures at issue were originally built on private land, and are encroachments solely due to the landward migration of the shoreline, not any action taken by the private landowner. It is simply unfair to require a private landowner to compensate the State for encroaching structures on lands that were once privately owned that have since been lost to erosion. This measure does not result in the State relinquishing its ownership of submerged lands to a private party. Furthermore, shoreline encroachment easements granted by the Board are non-exclusive, preserving the public's right of access to lands seaward of the shoreline.

Enactment of this measure will not negatively impact beach resources or proliferate shoreline hardening. The bill does not act as a substitute to any permitting requirements as shoreline protection structures will still be subject to all existing state and county regulatory requirements. Furthermore, current Department practice requires that prior to taking any request for a shoreline encroachment easement to the Board for approval all such requests are subject to review by the Department's Office of Conservation and Coastal Lands ("OCCL"). As part of their review criteria, OCCL examines whether the continued presence of the encroachment will detrimentally impact the existing beaches and other coastal resources.

Thank you for your kind consideration of this measure.

Very Truly Yours,

Suzanne D. Case
Chairperson

Keith Downing
Member

James A. Gomes

Member

Samuel 'Ohu Gon III
Member

Thomas Oi
Member

Stanley H. Roehrig
Member

Christopher Yuen
Member

CC: Executive Director, Office of Planning
Administrator, Coastal Zone Management Program
Chief Executive Office, Office of Hawaiian Affairs

H.B. NO. 1120

A BILL FOR AN ACT

RELATING TO SPECIAL SHORELINE ENCROACHMENT EASEMENTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. In *County of Hawaii v. Sotomura*, 55 Haw. 176, 517
2 P.2d 57 (1973), the Hawaii supreme court held that "land below the
3 high water mark, like flowing water, is a natural resource owned
4 by the state subject to, but in some sense in trust for, the
5 enjoyment of certain public rights." As a result of this
6 ruling, any structures located seaward of the shoreline location
7 as determined by the department of land and natural resources
8 (department) would be considered encroachments upon public land.

9 When an encroachment is discovered, it may be resolved by
10 either removal or obtaining an easement from the department.
11 Generally, an easement must be obtained from the department for
12 a structure within the shoreline area even if the structure was
13 located within the record boundary of the landward property at
14 the time of construction.

15 The department has been named as a party in claims
16 regarding structures, improvements, and debris in the shoreline
17 area that was once private property.

EXHIBIT "B"

LNR-01(17)

Pursuant to sections 171-13 and 171-17(b), Hawaii Revised Statutes, easements granted by the board of land and natural resources (board) under the circumstances described above require compensation at fair market value.

The purpose of this Act is to provide the board the discretion to grant easements for less than fair market value in regards to encroaching structures that were authorized by an appropriate regulatory agency and originally constructed landward of the shoreline and within the record boundary of an oceanfront property but are now located within the shoreline area, due to the dynamic nature of the location of the shoreline.

SECTION 2. Chapter 171, Hawaii Revised Statutes, is amended by adding a new section to be designated and to read as follows:

"§171-13.5 Special shoreline encroachment easements. (a)
The term "special shoreline encroachment" means a structure that
was authorized by a governmental authority and located landward
of the shoreline (as defined in chapter 205A) within the record
boundary of the property at the time of construction, but is now
located seaward of the shoreline on public land.

1 (b) Such special shoreline encroachments described and
2 defined in subsection (a) may be granted easements for a value
3 determined by the board notwithstanding section 171-17. The
4 granting of an easement in accordance with this section shall
5 not be construed as state ownership of the shoreline
6 encroachments.

7 (c) Easements granted in accordance with this section
8 shall not require the prior approval of the governor or prior
9 authorization of the legislature pursuant to section 171-53.

10 (d) Easements granted in accordance with this section
11 shall take into account the public policies of protection and
12 preservation of the natural shoreline and public pedestrian
13 access along the shoreline and the long-term risks to life and
14 property from coastal hazards."

15 SECTION 3. Section 171-53, Hawaii Revised Statutes, is
16 amended by amending subsection (c) to read as follows:

17 "(c) The board, with the prior approval of the governor
18 and the prior authorization of the legislature by concurrent
19 resolution, may lease state submerged lands and lands beneath
20 tidal waters under the terms, conditions, and restrictions
21 provided in this chapter; provided that the authorization of the
22 legislature shall not be required for leases issued under

H.B. NO. 1170

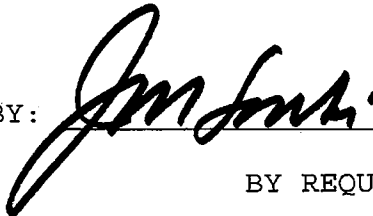
1 chapter 190D; and provided further that the approval of the
2 governor and authorization of the legislature shall not be
3 required for any grant of easement or lease of state submerged
4 lands or lands beneath tidal waters used for moorings, cables,
5 ~~[or]~~ pipelines~~[,]~~, or any special shoreline encroachment as
6 described and defined in section 171-13.5; provided further that
7 this exemption shall not apply to easements for cables used for
8 interisland electrical transmission or slurry pipelines used for
9 transportive materials, mined at sea, or waste products from the
10 processing of the same.

11 The lease shall provide that the lands shall be reclaimed
12 at the expense of the lessee. Title to the reclaimed lands
13 shall remain in the State."

14 SECTION 4. Statutory material to be repealed is bracketed
15 and stricken. New statutory material is underscored.

16 SECTION 5. This Act, upon its approval, shall take effect
17 retroactive to July 1, 2012.

18
19 INTRODUCED BY:



BY REQUEST

JAN 23 2017

H.B. NO. 1120

Report Title:

Special Shoreline Encroachment Easements

Description:

Provides the Board of Land and Natural Resources discretion to grant easements for less than fair market value for structures that were authorized by a governmental authority and located landward of the shoreline within the record boundary of the property at the time of construction, but are now located seaward of the valid certified shoreline on public land.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

JUSTIFICATION SHEET

DEPARTMENT: Land and Natural Resources

TITLE: A BILL FOR AN ACT RELATING TO SPECIAL
SHORELINE ENCROACHMENT EASEMENTS.

PURPOSE: To provide the Board of Land and Natural
Resources (Board) the discretion to
determine the value at which to grant
shoreline encroachment easements for
structures that were previously authorized
by a governmental agency and originally
located landward of the shoreline within the
record boundary of the property at the time
of construction, but are now located seaward
of the shoreline on public land; and to
exempt easements granted under these
circumstances from prior approval of the
Governor and prior authorization of the
Legislature pursuant to section 171-53(c),
Hawaii Revised Statutes (HRS).¹

MEANS: Add a new section to chapter 171, HRS, and
amend section 171-53(c), HRS.

JUSTIFICATION: In *County of Hawaii v. Sotomura*, 55 Haw.
176, 517 P.2d 57 (1973), the Hawaii Supreme
Court held that "land below the high water
mark, like flowing water, is a natural
resource owned by the state subject to, but
in some sense in trust for, the enjoyment of
certain public rights." As a result of the
ruling, any structures located seaward of
the shoreline location would be considered
encroachments upon public land.

When an encroachment is discovered, it may
be resolved by either removal or obtaining
an easement. Generally, an easement must be
obtained from the Department for a structure
located below the shoreline even if the
structure was located within the record
boundary of the property at the time of
construction.

This legislative proposal seeks to address a situation of inherent unfairness when structures that were authorized by a governmental authority and originally located landward of the shoreline within the record boundary of the property at the time of construction, but are now located seaward of the shoreline on public land, and easements to legitimize such encroachments require compensation to the State at fair market value under section 171-17, HRS. The purpose of requiring an easement under these circumstances is to resolve issues of liability and indemnity and not revenue generation, and as such, this measure seeks to grant the Board the flexibility to determine the value of such easements.

Considering that the structures were originally built on private property, an exemption from section 171-53(c), HRS, likely would not compromise the State's fiduciary obligations. In addition, given the volume of easements that are expected to be processed, this exemption would greatly expedite the disposition process.

Allowing the Board to determine the value at which the easements are granted via a streamlined process² would assist in encouraging compliance from shoreline landowners by having these landowners enter into easements with the State.

Impact on the public: By resolving the liability and indemnity issues, taxpayers will have greater protection from potential legal and financial liability against the State with regard to these structures.

Impact on the department and other agencies: By facilitating compliance from landowners, this bill will reduce the burden on staff resources from having to pursue enforcement actions.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION: LNR 101.

OTHER AFFECTED
AGENCIES: None.

EFFECTIVE DATE: Retroactive to July 1, 2012, upon its
approval.³

¹ Only easements for moorings, cables, and pipelines on submerged lands are currently exempt from the requirement of prior approval of the Governor and prior authorization of the Legislature.

² The appraisal process under section 171-17, HRS, can sometimes be expensive and time consuming.

³ The Department is seeking an effective date retroactive to July 1, 2012, to accommodate certain shoreline easements that were previously approved by the Board, subject to the enactment of a statute that authorizes the Board to grant such easements for less than fair market value, that may meet the stringent requirements for below market value compensation stated in this legislative proposal. Past practice was that easements were required only for encroachments located outside of a property's record boundary. In 2011, the Board began to require easements for encroachment located seaward of the shoreline as well, necessitating this measure. The retroactive date would cover those easements approved by the Board that meet the criteria established in this measure.

S.B. NO. 986

JAN 25 2017

A BILL FOR AN ACT

RELATING TO SPECIAL SHORELINE ENCROACHMENT EASEMENTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. In *County of Hawaii v. Sotomura*, 55 Haw. 176, 517
2 P.2d 57 (1973), the Hawaii supreme court held that "land below the
3 high water mark, like flowing water, is a natural resource owned
4 by the state subject to, but in some sense in trust for, the
5 enjoyment of certain public rights." As a result of this
6 ruling, any structures located seaward of the shoreline location
7 as determined by the department of land and natural resources
8 (department) would be considered encroachments upon public land.

9 When an encroachment is discovered, it may be resolved by
10 either removal or obtaining an easement from the department.
11 Generally, an easement must be obtained from the department for
12 a structure within the shoreline area even if the structure was
13 located within the record boundary of the landward property at
14 the time of construction.

15 The department has been named as a party in claims
16 regarding structures, improvements, and debris in the shoreline
17 area that was once private property.

1 Pursuant to sections 171-13 and 171-17(b), Hawaii Revised
2 Statutes, easements granted by the board of land and natural
3 resources (board) under the circumstances described above
4 require compensation at fair market value.

5 The purpose of this Act is to provide the board the
6 discretion to grant easements for less than fair market value in
7 regards to encroaching structures that were authorized by an
8 appropriate regulatory agency and originally constructed
9 landward of the shoreline and within the record boundary of an
10 oceanfront property but are now located within the shoreline
11 area, due to the dynamic nature of the location of the
12 shoreline.

13 SECTION 2. Chapter 171, Hawaii Revised Statutes, is
14 amended by adding a new section to be designated and to read as
15 follows:

16 "§171-13.5 Special shoreline encroachment easements. (a)
17 The term "special shoreline encroachment" means a structure that
18 was authorized by a governmental authority and located landward
19 of the shoreline (as defined in chapter 205A) within the record
20 boundary of the property at the time of construction, but is now
21 located seaward of the shoreline on public land.

S.B. NO. 986

1 (b) Such special shoreline encroachments described and
2 defined in subsection (a) may be granted easements for a value
3 determined by the board notwithstanding section 171-17. The
4 granting of an easement in accordance with this section shall
5 not be construed as state ownership of the shoreline
6 encroachments.

7 (c) Easements granted in accordance with this section
8 shall not require the prior approval of the governor or prior
9 authorization of the legislature pursuant to section 171-53.

10 (d) Easements granted in accordance with this section
11 shall take into account the public policies of protection and
12 preservation of the natural shoreline and public pedestrian
13 access along the shoreline and the long-term risks to life and
14 property from coastal hazards."

15 SECTION 3. Section 171-53, Hawaii Revised Statutes, is
16 amended by amending subsection (c) to read as follows:

17 "(c) The board, with the prior approval of the governor
18 and the prior authorization of the legislature by concurrent
19 resolution, may lease state submerged lands and lands beneath
20 tidal waters under the terms, conditions, and restrictions
21 provided in this chapter; provided that the authorization of the
22 legislature shall not be required for leases issued under

S.B. NO. 986

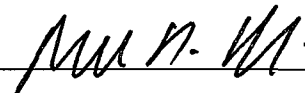
1 chapter 190D; and provided further that the approval of the
2 governor and authorization of the legislature shall not be
3 required for any grant of easement or lease of state submerged
4 lands or lands beneath tidal waters used for moorings, cables,
5 ~~[or]~~ pipelines~~[+]~~, or any special shoreline encroachment as
6 described and defined in section 171-13.5; provided further that
7 this exemption shall not apply to easements for cables used for
8 interisland electrical transmission or slurry pipelines used for
9 transportive materials, mined at sea, or waste products from the
10 processing of the same.

11 The lease shall provide that the lands shall be reclaimed
12 at the expense of the lessee. Title to the reclaimed lands
13 shall remain in the State."

14 SECTION 4. Statutory material to be repealed is bracketed
15 and stricken. New statutory material is underscored.

16 SECTION 5. This Act, upon its approval, shall take effect
17 retroactive to July 1, 2012.

18
19 INTRODUCED BY: _____



20 BY REQUEST

S.B. NO. 986

Report Title:

Special Shoreline Encroachment Easements

Description:

Provides the Board of Land and Natural Resources discretion to grant easements for less than fair market value for structures that were authorized by a governmental authority and located landward of the shoreline within the record boundary of the property at the time of construction, but are now located seaward of the valid certified shoreline on public land.

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JUSTIFICATION SHEET

DEPARTMENT: Land and Natural Resources

TITLE: A BILL FOR AN ACT RELATING TO SPECIAL
SHORELINE ENCROACHMENT EASEMENTS.

PURPOSE: To provide the Board of Land and Natural
Resources (Board) the discretion to
determine the value at which to grant
shoreline encroachment easements for
structures that were previously authorized
by a governmental agency and originally
located landward of the shoreline within the
record boundary of the property at the time
of construction, but are now located seaward
of the shoreline on public land; and to
exempt easements granted under these
circumstances from prior approval of the
Governor and prior authorization of the
Legislature pursuant to section 171-53(c),
Hawaii Revised Statutes (HRS).¹

MEANS: Add a new section to chapter 171, HRS, and
amend section 171-53(c), HRS.

JUSTIFICATION: In *County of Hawaii v. Sotomura*, 55 Haw.
176, 517 P.2d 57 (1973), the Hawaii Supreme
Court held that "land below the high water
mark, like flowing water, is a natural
resource owned by the state subject to, but
in some sense in trust for, the enjoyment of
certain public rights." As a result of the
ruling, any structures located seaward of
the shoreline location would be considered
encroachments upon public land.

When an encroachment is discovered, it may
be resolved by either removal or obtaining
an easement. Generally, an easement must be
obtained from the Department for a structure
located below the shoreline even if the
structure was located within the record
boundary of the property at the time of
construction.

SB. NO. 986

This legislative proposal seeks to address a situation of inherent unfairness when structures that were authorized by a governmental authority and originally located landward of the shoreline within the record boundary of the property at the time of construction, but are now located seaward of the shoreline on public land, and easements to legitimize such encroachments require compensation to the State at fair market value under section 171-17, HRS. The purpose of requiring an easement under these circumstances is to resolve issues of liability and indemnity and not revenue generation, and as such, this measure seeks to grant the Board the flexibility to determine the value of such easements.

Considering that the structures were originally built on private property, an exemption from section 171-53(c), HRS, likely would not compromise the State's fiduciary obligations. In addition, given the volume of easements that are expected to be processed, this exemption would greatly expedite the disposition process.

Allowing the Board to determine the value at which the easements are granted via a streamlined process² would assist in encouraging compliance from shoreline landowners by having these landowners enter into easements with the State.

Impact on the public: By resolving the liability and indemnity issues, taxpayers will have greater protection from potential legal and financial liability against the State with regard to these structures.

Impact on the department and other agencies: By facilitating compliance from landowners, this bill will reduce the burden on staff resources from having to pursue enforcement actions.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION: LNR 101.

OTHER AFFECTED
AGENCIES: None.

EFFECTIVE DATE: Retroactive to July 1, 2012, upon its
approval.³

¹ Only easements for moorings, cables, and pipelines on submerged lands are currently exempt from the requirement of prior approval of the Governor and prior authorization of the Legislature.

² The appraisal process under section 171-17, HRS, can sometimes be expensive and time consuming.

³ The Department is seeking an effective date retroactive to July 1, 2012, to accommodate certain shoreline easements that were previously approved by the Board, subject to the enactment of a statute that authorizes the Board to grant such easements for less than fair market value, that may meet the stringent requirements for below market value compensation stated in this legislative proposal. Past practice was that easements were required only for encroachments located outside of a property's record boundary. In 2011, the Board began to require easements for encroachment located seaward of the shoreline as well, necessitating this measure. The retroactive date would cover those easements approved by the Board that meet the criteria established in this measure.

DAVID Y. IGE
GOVERNOR



DOUGLAS S. CHIN
ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 Queen Street
Honolulu, Hawaii 96813

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY
GENERAL

December 11, 2017

The Honorable Suzanne D. Case
Chairperson, Board of Land and Natural Resources
State of Hawai'i
1151 Punchbowl Street, Room 130
Honolulu, Hawai'i 96813

Dear Chairperson Case:

RE: Shoreline Encroachment Easements

INTRODUCTION

By memorandum dated August 10, 2017, you asked for our advice regarding the Board of Land and Natural Resource's practice of requiring private owners of coastal properties to obtain easements for structures that were originally constructed on private property but are now located on State-owned land due to the landward migration of the shoreline.

QUESTIONS AND SUMMARY ANSWERS¹

1. What is the dividing line between public and private property with respect to oceanfront property?

Short answer: The State owns all lands makai of the "the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves." For convenience, we refer to this description as the

¹ The intent of your memorandum is clear even though it does not directly ask specific questions. We have taken the liberty of setting out questions we believe are raised.

"shoreline." This use of the term "shoreline" is closely related to but not exactly the same as the "certified shoreline" described in chapter 205A, Hawaii Revised Statutes (HRS). This line (the shoreline) is identical to -- and indeed defines -- the dividing line between public and private property (the ownership line).²

2. How is the ownership line affected when there is landward migration of the shoreline caused by erosion or sea level rise?

Short answer: By definition, if the shoreline moves landward, then the ownership line also moves mauka.³

3. What, if anything, is the effect of statutes that require the Board of Land and Natural Resources (Board) or the Attorney General to approve "acquisition" of real property?

Short answer: The State already owns an inchoate interest in land that might be gained through erosion or sea level rise. Ripening of this inchoate interest is not "acquisition" of land covered by these statutes. This result is fortified by the Supreme Court's decision in *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 403 P.3d 214 (2017). The Court held that the statutes do not "imperatively require" abrogation of common law rules or "evinced an express legislative intent to do so."

4. Does this result violate private owners' due process rights or constitute a "taking" of private property?

Short answer: No. The Hawai'i Supreme Court has specifically considered and rejected such claims. As to federal

² The shoreline and ownership lines are the same where the shoreline is not affected by structures. No Hawai'i case or statute addresses the question of where the ownership line is when the shoreline is affected by a seawall or other man-made structure. We have not found it necessary to address that question in providing this advice.

³ The term "mauka" means "inland." *Leslie v. Bd. of Appeals of County of Hawai'i*, 109 Haw. 384, 386, 126 P.3d 1071, 1073, note 3 (2006). A "mauka" movement of the ownership line means toward the mountain or (equivalently) away from the sea.

taking law, the State's inchoate rights in the property existed prior to private ownership. The interest lost was not part of private title to begin with and cannot be the basis of a taking claim.

5. Is the Attorney General required to give prior approval to State ownership of land by reason of erosion or sea level rise? Is the Attorney General required to approve as to legality and form documents relating to land owned by the State by reason of erosion or sea level rise?

Short answer: No. Ownership of land by erosion or sea level rise is not an acquisition of land and the State is not acquiring land within the meaning of those statutes. Therefore the statutes requiring that the Attorney General review and approve land acquisitions do not apply.

6. Can the Board require the former landowner to pay fair market value in order to obtain an easement or other interest in land now owned by the State?

Short answer: Yes, applicable statutes specifically provide for the payment of fair market value in most cases.

DISCUSSION

1. What is the dividing line between public and private property with respect to oceanfront property?

It is the uniform law of every coastal state that land below (seaward or "makai" of) the shoreline is owned by the State and held in public trust⁴ for the people of the State.⁵

⁴ The public trust doctrine is a common law doctrine, inherited from England and dating back to Roman law, dictating that all submerged lands are the property of the state and held in trust for the people. *Shively v. Bowlby*, 152 U.S. 1 (1894). The seminal United States case for the public trust doctrine is *Illinois Cent. R.R. Co. v. State of Illinois*, 146 U.S. 387 (1892). The seminal case in Hawai'i is *King v. Oahu Ry. & Land Co.*, 11 Haw. 717 (1899). In Hawai'i the public trust is also recognized in the Constitution, article XI, section 1.

⁵ The same issue can arise as to rivers, lakes, or other bodies of water. Indeed *Illinois Cent. R.R. Co.*, see *supra* note 4,

Most states define the shoreline/ownership boundary as the mean high tide mark. *Purdie v. Attorney Gen.*, 143 N.H. 661, 666, 732 A.2d 442, 446-47 (1999):

The few States that reject the mean high tide mark as the public-private shoreland boundary do so on distinct histories not applicable to our State. See, e.g., *Application of Ashford*, 50 Haw. 314, 440 P.2d 76, 77 (1968) (Hawaii boundary based on Hawaiian King's issuance of royal patents in 1866); *Bell v. Town of Wells*, 557 A.2d 168, 171-72 (Me.1989) (Massachusetts and Maine adopted mean low water as boundary line based on 1647 Massachusetts ordinance); cf. *Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. at 88-89, 649 A.2d at 608 (refusing to adopt Massachusetts rule for New Hampshire).

See also Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 Stan. Env'tl. L.J. 52, 57 (2011) ("In nearly all cases, the lines for defining the limits of private title and public access are the mean high water and mean low water marks.")

Purdie rightly identifies Hawai'i as a state with a unique approach to defining the shoreline. This approach was initiated and explained in three landmark cases, all authored by then Chief Justice William S. Richardson.

In *Application of Ashford*, 50 Haw. 314, 440 P.2d 76 (1968), the Court considered the ownership line in the context of a request to register land title in the land court:

Clinton R. Ashford and Joan B. S. Ashford, the appellees, petitioned the land court to register title to certain land situate on the Island of Molokai. The lands are the makai (seaward) portions of Royal Patent 3004 to Kamakaheki and Royal Patent 3005 to Kahiko, both issued on February 22, 1866.

concerned sale of land filled land reclaimed from Lake Michigan. Freshwater shorelines present some extraneous complications and are not further considered in this letter.

The question before this court is the location of the makai boundaries of both parcels of land, which are described in the royal patents as running 'ma ke kai' (along the sea). The appellees contend that the phrase describes the boundaries at mean high water which is represented by the contour traced by the intersection of the shore and the horizontal plane of mean high water based on publications of the U. S. Coast and Geodetic Survey.

50 Haw. at 314-15, 440 P.2d at 76-77.

The Court held that the boundary (ownership line) was not the mean high water mark. Rather the boundary -- pursuant to Hawaiian custom as established by kama'aina⁶ testimony -- is further mauka, specifically: '

along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves, and that the trial court erred in finding that it is the intersection of the shore with the horizontal plane of mean high water.

50 Haw. at 14, 440 P.2d at 77 (1968). That landmark ruling was confirmed and elaborated on in *Hawaii County v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973), and *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977). See *Sotomura*, 55 Haw. at 182, 517 P.2d at 62:

We hold as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka; the presumption is that the upper reaches of the wash of the waves

⁶ "Kama'aina" is defined as "Native-born, one born in a place, host." Other relevant senses include "acquainted [with], familiar." M. Pukui & S. Elbert, *Hawaiian Dictionary* 9 (rev. ed. 1986).

Leslie v. Bd. of Appeals of County of Hawai'i, 109 Haw. 384, 386, 126 P.3d 1071, 1073 (2006), as amended (Feb. 28, 2006).

over the course of a year lies along the line marking the edge of vegetation growth. The upper reaches of the wash of the waves at high tide during one season of the year may be further mauka than the upper reaches of the wash of the waves at high tide during the other seasons. Thus while the debris line may change from day to day or from season to season, the vegetation line is a more permanent monument, its growth limited by the year's highest wash of the waves.

See *Sanborn*, 57 Haw. at 182, 562 P.2d at 773 (1977):

The law of general application in Hawaii is that beachfront title lines run along the upper annual reaches of the waves, excluding storm and tidal waves.

2. How is the ownership line affected when the shoreline moves landward or mauka because of erosion or sea level rise?

These same cases address and resolve the issue of whether and how ownership changes when the shoreline moves landward or mauka due to erosion or rising sea levels.

Sotomura is particularly relevant. In that case, the private owner indisputably owned the land in the past. In fact, the private owner had registered the property in the land court. The land court had determined the seaward boundary of the property and described it by distances and azimuths. The shoreline moved mauka due to erosion. The Court framed the question as "whether title to land lost by erosion passes to the state." The Court noted that this was an issue of first impression in Hawai'i.

The Court held that the answer was "yes," making clear that the ownership was fluid and specifically that it changed with erosion:

We hold that registered ocean front property is subject to the same burdens and incidents as unregistered land, including erosion. HRS § 501-81. Thus the determination of the land court that the seaward boundary of Lot 3 is to be located along high water mark remains conclusive; however, the precise

location of the high water mark on the ground is subject to change and may always be altered by erosion.

55 Haw. at 180, 517 P.2d at 61.

Even the previous determination of boundaries in land court was not binding where the actual shoreline was altered by erosion:

This court recently rejected the position that the state cannot subsequently challenge title to registered land where the state later discovered that the seaward boundary was located further mauka than shown on the maps, and a portion of the property had become submerged by erosion.

55 Haw. at 181, 517 P.2d at 61 (citing *In re Application of Castle*, 54 Haw. 276, 277, 506 P.2d 1, 3 (1973)).⁷

⁷ *Sotomura* has a complex and murky path after the Hawai'i Supreme Court decision. The United States Supreme Court rejected the owners' petition for certiorari. 419 U.S. 872 (1974). Landowners then sued the County and State officials in federal court. The federal district court judge was the Honorable Dick Yin Wong. Judge Wong was previously the state land court judge. It was his decision that the Hawai'i Supreme Court reversed in *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977).

Judge Wong ruled in federal court that the Hawai'i Supreme Court deprived landowners of due process by deciding the case on a basis not presented by the parties or actually litigated. Judge Wong also held that the Hawai'i Supreme Court's decision "ignore[ed] vested property rights" and "was so radical a departure from prior state law as to constitute a taking of the Owners' property by the State of Hawaii without just compensation in violation of rights secured to them by the Fourteenth Amendment to the United States Constitution." *Sotomura v. Hawaii County*, 460 F. Supp. 473, 482-83 (D. Haw. 1978).

Although Judge Wong wrote the decision, it appears that Judge Samuel King entered the judgment. Defendants appealed but the

Importantly, the Court based its ruling on the common law principle that loss of land by erosion is an inherent aspect of littoral property:

The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership. . . . [W]hen the sea, lake or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the state. *In re City of Buffalo*, 206 N.Y. 319, 325, 99 N.E. 850, 852 (1912).

55 Haw. at 183, 517 P.2d at 62.

One reason for that common law rule (now abrogated in part by statute, section 171-2, HRS) is the tradeoff between accretion and erosion: "since the riparian owner may lose soil by the action of the water, he should have the benefit of any land gained by the same action." *Id.* (citing 65 C.J.S. *Navigable Waters* § 82(1), at 256 (1966) (footnotes omitted)). See *Application of Banning*, 73 Haw. 297, 303-04, 832 P.2d 724, 728 (1992), where the Court explained that accretion belongs to the littoral landowner.

Sotomura also relied on the public trust doctrine, citing to *King v. Oahu Ry. & Land Co.*, 11 Haw. at 723-24, for the proposition that:

The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

55 Haw. at 184, 517 P.2d at 63. Public policy therefore "favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." 55 Haw. at 182, 517 P.2d 61-62.

appeal was untimely. See *Sotomura v. Hawaii County*, 679 F.2d 152 (9th Cir. 1982).

This public policy remains in effect as the Court has repeatedly ruled. *Application of Banning*, 73 Haw. 297, 309-10, 832 P.2d 724, 731 (1992); *Diamond v. Dobbin*, 132 Haw. 9, 26, 319 P.3d 1017, 1034 (2014); *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 458, 403 P.3d 214, 235 (2017).

The Court reached the same result in *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977). *Sanborn* also concerned property registered in the land court where the shoreline moved mauka from the land court boundary. The Court framed the issue as:

In addressing the issue of the Sanborns' beachfront title line, the primary question is whether the line is to be determined according to Hawaii's general law of ocean boundaries, or whether certain distances and azimuths contained in the Sanborns' 1951 land court decree of registration are to prevail.

57 Haw. at 588, 562 P.2d at 773.

The Court specifically held that the land court boundary was subject to change in the event of erosion:

We hold that, regardless of whether or not there has been permanent erosion, the Sanborns' beachfront title boundary is the upper reaches of the wash of waves. Although we find that the State is bound by the 1951 decree to the extent that the decree fixes the Sanborns' title line as being 'along the high water mark at seashore', we also find that the specific distances and azimuths given for high water mark in 1951 are not conclusive, but are merely prima facie descriptions of high water mark, presumed accurate until proved otherwise.

57 Haw. at 590, 562 P.2d at 774.

The Ninth Circuit Court of Appeals made the same ruling in *Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990). The court there considered ownership of land that was mauka of the shoreline when ceded land was granted to the Territory in 1898. The land later became makai of the shoreline because of erosion. The court specifically held that the property moved from private to public ownership.

[T]he holdings in *Sotomura* and *Zimring*⁸ require us to conclude that if the 1.75 acres became submerged land because of natural erosion after 1898 and before being altered by the actions of the property owner, then that property would be ceded lands subject to the terms of the trust.

Napeahi v. Paty, 921 F.2d 897, 903 (9th Cir. 1990).

For these reasons and based on the cases cited above, we advise that the law in Hawai'i is that when the shoreline boundary migrates landward or mauka because of erosion or sea level rise, the State owns the additional submerged land that results from the migration.

3. What, if anything, is the effect of statutes that require the Board of Land and Natural Resources (Board) or the Attorney General to approve "acquisition" of real property?

A concern has been raised as to a trio of statutes that require Board and Attorney General approval of acquisitions of real property or interests in real property. The statutes are sections 26-7, 107-10, and 171-30, HRS.⁹

⁸ *State by Kobayashi v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977). This case is discussed in more detail below.

⁹ Section 26-7, HRS provides in relevant part:

The department [of the attorney general] shall . . . approve as to legality and form all documents relating to the acquisition of any land or interest in lands by the State

Section 107-10, HRS, provides in relevant part:

No real property or any right, title, or interest therein shall be acquired by agreement, purchase, gift, devise, eminent domain, or otherwise, for any purpose, by the State or any department, agency, board, commission, or officer thereof, without the

We advise that those statutes are not applicable to change in the ownership line caused by landward or mauka migration of the shoreline due to erosion or sea level rise. As we now show, the possibility of boundary changes due landward or mauka migration of the shoreline due to erosion and accretion is already part of the State's ownership of public trust land. That possibility already encumbers private littoral land. *Sotomura*, 55 Haw. at 183, 517 P.2d at 62. When the State comes into possession of land because of erosion or sea level rise, the State is not "acquiring" property within the meaning of the statutes.

State by Kobayashi v. Zimring, 58 Haw. 106, 566 P.2d. 725 (1977), is a key case supporting this proposition. *Zimring*

prior approval of the attorney general as to form, exceptions, and reservations.

Section 171-30, HRS, provides in relevant part:

(a) The board of land and natural resources shall have the exclusive responsibility, except as provided herein, of acquiring, including by way of dedications:

(1) All real property or any interest therein and the improvements thereon, if any, required by the State for public purposes, including real property together with improvements, if any, in excess of that needed for such public use in cases where small remnants would otherwise be left or where other justifiable cause necessitates the acquisition to protect and preserve the contemplated improvements, or public policy demands the acquisition in connection with such improvements.

(2) Encumbrances, in the form of leases, licenses, or otherwise on public lands, needed by any state department or agency for public purposes or for the disposition for houselots or for economic development.

The board shall upon the request of and with the funds from the state department or agency effectuate all acquisitions as provided under this section.

addressed ownership of lands newly created by a 1955 lava flow that extended the shoreline and added 7.9 acres of land in the Puna area. One of the issues in that case was whether the lava extension was ceded land acquired by the State from the federal government. The State argued that the federal government transferred the lands to the State under section 5(b) of the Admission Act. The opponents countered that the only lands that passed to the State under section 5(b) were those lands ceded to the United States by the Republic of Hawaii in 1898. They argued that the lava extension did not exist in 1898, and could not have been ceded to the United States. The Hawaii Supreme Court disagreed with the opponents and sided with the State. The Court held that the term "property," as used in the Joint Resolution of Annexation, is "extremely broad," and includes "property which is real, personal and mixed, choate and inchoate, corporal or incorporeal." *Id.* at 122-23, 566 P. 2d at 736.

The lava land was an inchoate property right in 1898. When the lava land was later created, that circumstance resulted in the ripening of State ownership of ceded land even though the land did not exist in 1898.

Napeahi v. Paty, 921 F.2d 897 (9th Cir. 1990), is on point for the proposition that an inchoate property interest in the possibility of erosion was also "public property" under the Joint Resolution of Annexation. In that case, a native Hawaiian sued the State, alleging that the State had a trust duty under the Admission Act to claim ownership of 1.75 acres shorefront property Kona. It was undisputed that "at the time the public land was ceded by the Republic of Hawaii to the United States in 1898, it did not include the 1.75 acres in contention." 921 F.2d at 902. However, that did not "end the inquiry." Relying on *Zimring* and *Sotomura*, the Ninth Circuit ruled that the land passed from private to public ownership because of erosion -- automatically and as a matter of law:

There is no reason to distinguish the inchoate property interest in submerged land that could be acquired by the State as the result of erosion from that which could be acquired by a lava extension. Both were inchoate property interests which *Zimring* held to be property that was ceded to the United States and then returned to the State in 1959. Thus, the holdings in *Sotomura* and *Zimring* require us to

conclude that if the 1.75 acres became submerged land because of natural erosion after 1898 and before being altered by the actions of the property owner, then that property would be ceded lands subject to the terms of the trust.

921 F.2d at 903.

We therefore conclude that under Hawai'i law, the State holds an inchoate right to land that may pass to it by erosion or sea level rise. This is an inherent aspect of the State's ownership of land, already owned by the State (and by the Territory before it). Ripening of that inchoate right is not "acquiring" or "acquisition" of real property under any of the statutes cited above.

This conclusion is bolstered by the Hawai'i Supreme Court's recent ruling in *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 403 P.3d 214 (2017). The issue in that case was whether the State owned seawalls and land under the seawalls because the general public used the seawalls as a walkway. The State argued that under section 264-1, HRS, property could only be dedicated to the State by "deed of conveyance" accepted by the State. The State also cited to and relied on the other statutes cited above. The Court rejected this argument, holding that an "implied dedication" is not a "dedication" covered by section 264-1, HRS.

Instead implied dedication is a common law doctrine, not addressed or abrogated by section 264-1, HRS, or by the other statutes discussed above. The Court articulated a strict standard for statutory abrogation of common law rights:

The Hawaii Revised Statutes, and in particular, HRS §§ 264-1(c)(1), 171-30, 26-7, 107-10, and 520-7, do not "imperatively require" abrogation of common law implied dedication, nor do they evince an express legislative intent to do so. Minneapolis Fire & Marine Ins. v. Matson Nav. Co., 44 Haw. 59, 67-68, 352 P.2d 335, 340 (1960); Burns Int'l Sec. Servs., Inc. v. Dep't of Transp., 66 Haw. 607, 611, 671 P.2d 446, 449 (1983).

140 Haw. at 452, 403 P.3d at 229.

We believe the Court would view the statutes in the same way with respect to land gained by erosion or sea level rise -- there is no express intention to abrogate common law principles to the effect that the State owns the land without the need for affirmative action by either the Land Board or the Attorney General.

This conclusion is consistent with case law from other jurisdictions which have generally viewed a state's interest in land that may come to the public trust in the future as either a vested or contingent future interest. For example in *Severance v. Patterson*, 370 S.W.3d 705, 718 (Tex. 2012), the Texas Supreme Court said:

A person purchasing beachfront property along the Texas coast does so with the risk that her property may eventually, or suddenly, recede into the ocean. When beachfront property recedes seaward and becomes part of the wet beach or submerged under the ocean, a private property owner loses that property to the public trust.

Similarly in *Nies v. Town of Emerald Isle*, 780 S.E.2d 187 (N.C. Ct. App. 2015), cert. denied, 2017 WL 1550808 (U.S. Oct. 2, 2017) the court ruled against a taking claim. Under North Carolina common law the dry sand portion of plaintiffs' property had always been encumbered by the public trust. Thus enforcement of that public trust did not interfere with or "take" any pre-existing right. See generally Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in A Changing Climate*, 30 Stan. Envtl. L.J. 51, 87 (2011).

4. Does this result violate private owners' due process rights or constitute a "taking" of private property?

In *Application of Sanborn*, 57 Haw. 585, 596, 562 P.2d 771, 777-78 (1977), the Sanborns argued that the Court's ruling raised constitutional issues, including a takings claim.

The Sanborns contend that both the Hawaii and federal constitutions would be violated if this court fixes the Sanborns' title line along the upper reaches of the wash of waves. It is contended that such an adjudication would be a taking of private property for

public use without just compensation and also, by allegedly denying res judicata to the 1951 decree, would be a violation of due process per se.

The Court rejected these arguments, because its ruling was simply an application of existing Hawai'i law:

Under our interpretation of the 1951 decree, we see no constitutional infirmity. The 1951 decree recognized that the Sanbors' [sic] title extends to a line 'along high water mark'. We affirm the holding in *McCandless*, supra, that distances and azimuths in a land court decree are not conclusive in fixing a title line on a body of water, where the line is also described in general terms as running along the body of water.

Id. This ruling resolves the issue in state courts.

Nor are there viable federal claims, notwithstanding the suggestion to the contrary in *Sotomura v. Hawaii County*, 460 F. Supp. 473 (D. Haw. 1978). As explained in the previous section of this opinion, the possibility that private littoral land may pass into public ownership is an inherent part of the State's ownership of land. And conversely, the possibility that the seaward boundary may migrate inherently burdens private shoreline property.

This is important to the putative taking claim because the threshold question in any taking case is whether "private property" is being taken at all. As the Supreme Court put it in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992), compensation need not be paid "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."

Similarly, in *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002), the Ninth Circuit denied a taking claim after determining as a threshold issue that "plaintiff's claimed property right never existed" in the first place. See also *Maritrans Inc. v. U.S.*, 342 F.3d 1344, 1351 (Fed. Cir. 2003) (In deciding whether governmental action constitutes a taking of private property without just compensation, "[f]irst, a court must evaluate whether the

claimant has established a 'property interest' for purposes of the Fifth Amendment."); *Conti v. U.S.*, 291 F.3d 1334, 1339 (Fed. Cir. 2002) ("However, if a claimant fails to demonstrate that the interest allegedly taken constituted a property interest under the Fifth Amendment, a court need not even consider whether the government regulation was a taking."); *Raceway Park, Inc. v. Ohio*, 356 F.3d 677, 683 (6th Cir. 2004) ("[T]here is no taking if there is no private property in the first place.").

Property rights are protected by the federal and state constitutions. They are not, however, "created by the [federal] Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Cf. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Env'tl. Prot.*, 560 U.S. 702, 707 (2010) ("State law defines property interests.").

As noted above, the Hawai'i Supreme Court has definitively ruled:

The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership.

Sotomura, 55 Haw. at 183, 517 P.2d at 62.

It follows that "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. Thus there is no taking.

- 5. Is the Attorney General required to give prior approval to State ownership of land by reason of erosion or sea level rise? Is the Attorney General required to approve as to legality and form documents relating to land owned by the State by reason of erosion or sea level rise?**

As shown by the discussion of question 3, ownership of land by erosion or sea level rise occurs pursuant to the common law and is a ripening of a pre-existing inchoate right in the land. This ripening is not an acquisition of land and the State is not acquiring land within the meaning of those statutes. It follows

that the Attorney General does not have to review the ownership change and does not have to review or approve "documents relating to" the ownership.

We note that all of the cases discussed above (*Ashford*, *Sotomura*, *Sanborn*, and *Napeahi*) were decided after enactment of the three laws. None of the cases imposed the additional requirement that the Attorney General or the Board approve State ownership. In light of those cases, we do not believe the Supreme Court would require Attorney General approval. See *Gold Coast*, 140 Haw. at 455, 403 P.3d at 232: "These provisions express no intent to abrogate common law implied dedication, nor have they ever been mentioned by our courts as having any relevance to the doctrine."

Conversely, we do not believe the Court would uphold a hypothetical refusal by the Attorney General to approve ownership by reason of change in the shoreline.

6. Can the Board require the former landowner to pay fair market value in order to obtain an easement or other interest in land now owned by the State?

Not only can the Board require a former landowner to pay fair market value, but it must do so under current law. Applicable statutes specifically require fair market value in most cases. See, e.g., section 171-13, HRS (requiring that easements be sold for fair market value determined pursuant to section 171-17(b), HRS).

This requirement could be changed by the Legislature. We understand that the Department has introduced appropriate legislation but has not been successful.

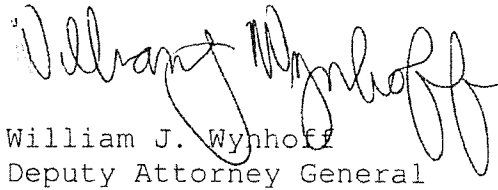
CONCLUSION

For these reasons, we conclude that the State owns additional public land resulting when the shoreline has migrated landward or mauka due to erosion or sea level rise, that this migration does not give rise to a constitutional claim by the former owner, that this result is not affected by laws relating to the acquisition of real property, that the Attorney General

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does not need to give prior approval in connection with such land, and that the Board can and should charge former owners fair market value in return for an easement interest in the land.

Very truly yours,



William J. Wynhoff
Deputy Attorney General

APPROVED:



Douglas S. Chin
Attorney General

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